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September 1, 2005

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Memorandum of Ex Parte Presentation
WC Docket No. 04-30, Emergency Request for Declaratory Ruling

Dear Ms. Dortch:

SBC takes this opportunity to update the record in this proceeding by submitting a draft decision by the Connecticut Department of Public Utility Control (DPUC) to decline jurisdiction to arbitrate issues relating to Gemini's request for access to SBC's hybrid fiber coaxial (HFC) facilities in Connecticut, which was released yesterday. In its draft decision, the DPUC noted that, on February 4, 2004, SBC filed a petition for declaratory ruling and order preempting the DPUC's December 17, 2003 decision granting Gemini access to SBC's HFC facilities, and concluded that, if the Commission grants SBC's petition, arbitration of the issues remaining before the DPUC would be moot. The DPUC further observed that the FCC is "best able to act on the Gemini [arbitration] petition in a manner that is consistent with its future decision [on SBC's petition] in WC Docket No. 04-30." Draft Decision at 2. The DPUC therefore declined jurisdiction to arbitrate the remaining issues raised by Gemini's arbitration petition, noting that, under section 252(e)(5), the Commission must assume the responsibilities of a state commission over an arbitration proceeding if the state fails to act.¹

SBC respectfully requests that, in light of the DPUC's apparent intent to relinquish jurisdiction over Gemini's arbitration petition, the Commission promptly grant SBC's pending emergency petition for a declaratory ruling to clarify that the states cannot unilaterally expand those unbundling requirements by ordering ILECs to unbundle

¹ Draft Decision at 2, citing 47 U.S.C. § 252(e)(5). That section provides that, "[i]f a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission." *Id.*

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facilities that the Commission has held need not be unbundled, or for which the Commission has made no impairment finding.²

Pursuant to Section 1.1206(b) of the Commission's rules, this letter and attachments are being electronically filed. I ask that this letter be placed in the files for the proceedings identified above.

Please call me should you have any questions.

Sincerely,

/s/ Brian J. Benison

CC: Tom Navin
Terri Natoli
Michelle Carey
Denise Coca

Attachment

² See Petition for Declaratory Ruling filed February 10, 2004

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 05-02-04 PETITION OF GEMINI NETWORKS CT, INC. FOR
ARBITRATION TO ESTABLISH AN INTERCONNECTION
AGREEMENT WITH THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY

August 31, 2005

By the following Commissioners:

Anne C. George
John W. Betkoski, III
Donald W. Downes

DRAFT DECISION

This draft Decision is being distributed to the parties in this proceeding for comment. The proposed Decision is not a final Decision of the Department. The Department will consider the parties' arguments and exceptions before reaching a final Decision. The final Decision may differ from the proposed Decision. Therefore, this draft Decision does not establish any precedent and does not necessarily represent the Department's final conclusion.

On January 2, 2003, Gemini Networks CT, Inc. (Gemini) petitioned the Department of Public Utility Control (Department) to issue a Declaratory Ruling finding that certain hybrid fiber coaxial facilities (HFC) owned by The Southern New England Telephone Company d/b/a/ SBC Connecticut (SBC Connecticut), and not currently in use, be deemed unbundled network elements (UNE) and be offered on an element by element basis to Gemini at total service long run incremental cost (TSLRIC) pricing. In a Decision issued on December 17, 2003, the Department determined that the HFC facilities in question are subject to unbundling and ordered SBC Connecticut to

unbundle the HFC network, and further concluded that in order for Gemini to gain access to the HFC network UNEs, it must negotiate and enter into an interconnection agreement with SBC Connecticut pursuant to §§ 251 and 252 of the Telecommunications Act of 1996 (Telcom Act).

On February 4, 2004, SBC Connecticut filed with the Federal Communications Commission (Commission or FCC) an emergency request for a declaratory ruling and order preempting the Department's December 17, 2004 Decision. The Emergency Request filed by SBC Connecticut seeks a determination from the Commission that the Department's December 17, 2004 Decision is inconsistent with the Telcom Act because: 1) it compels the unbundling of facilities that do not meet the definition of a network element; 2) the facilities are not part of SBC Connecticut's local telecommunications network; 3) the Decision is contrary to the Commission's Triennial Review Order;¹ 4) Gemini does not provide qualifying services; and 5) the Department improperly applied its impairment standard.

On February 12, 2004, the Commission established a pleading cycle for comments on SBC Connecticut's Emergency Request under WC Docket No. 04-30. The Emergency Request remains under consideration at the FCC.

On February 8, 2005, pursuant to Sections 252(b) and 252(i) of the Telcom Act, Gemini petitioned the Department for arbitration of certain rates, terms, and conditions for interconnection and related arrangements with SBC Connecticut. The unresolved issues relate in large measure to HFC unbundling.

Pursuant to Section 252(e)(5) of the Telcom Act, the FCC may preempt a State's commission's jurisdiction over an arbitration proceeding, and thereby assume the responsibility of the State commission with respect to the arbitration proceeding, and act for the State commission.

Because the Gemini arbitration petition principally requests resolution of issues associated with HFC unbundling, and because the permissibility of HFC unbundling is at issue in WC Docket No. 04-30, arbitration of those issues by the Department may become a nullity. Because the FCC is best able to act on the Gemini petition in a manner that is consistent with its future determinations in WC Docket No. 04-30, the Department hereby declines jurisdiction over the Gemini arbitration. The Department encourages the parties to seek an arbitrated resolution of unresolved interconnection issues at the FCC, where such issues can be resolved consistent with its consideration of WC Docket No. 04-30.

For the foregoing reasons, the Department hereby dismisses the February 8, 2005 Gemini arbitration petition.

¹ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, FCC 04-290 (rel. Feb. 4, 2005).

**DOCKET NO. 05-02-04 PETITION OF GEMINI NETWORKS CT, INC. FOR
ARBITRATION TO ESTABLISH AN INTERCONNECTION
AGREEMENT WITH THE SOUTHERN NEW ENGLAND
TELEPHONE COMPANY**

This Decision is adopted by the following Commissioners:

Anne C. George

John W. Betkoski, III

Donald W. Downes

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

Date

DOCKET NO. 05-02-04

PETITION OF GEMINI NETWORKS CT, INC. FOR
ARBITRATION TO ESTABLISH AN INTERCONNECTION
AGREEMENT WITH THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

NOTICE OF WRITTEN EXCEPTIONS
(August 31, 2005)

The Department of Public Utility Control (Department) will accept written exceptions and/or briefs from admitted Parties and Intervenor in the docket cited above, concerning the attached draft Decision. Written exceptions and/or briefs concerning the draft Decision may be filed with the Department's Executive Secretary's Office on or before Wednesday, September 14, 2005, by 4:00 p.m.

Documents must be filed with the Executive Secretary of the Department in both electronic and paper form. The date and time of filing shall be the date and time the Department first receives a complete electronic version or the paper version and the required number of paper copies. Unless otherwise specified, filings are due by 4:00 p.m. on or before any required date. If a complete electronic version of the filing is submitted through the Department's Web Filing System, only one paper version of the filing is generally required.

If a complete electronic version of the filing is not web filed, submit an original and nine (9) copies for all briefs, reply briefs and comments/written exceptions. Each copy shall be collated and secured with the docket number prominently displayed on the first page.

The Department expects to render a final decision on this matter on Wednesday, September 28, 2005, at 9:30 a.m.

Dated at New Britain, Connecticut this 31st day of August, 2005.

DEPARTMENT OF PUBLIC UTILITY CONTROL

Louise E. Rickard
Acting Executive Secretary

By:

Peter J. Jenkelunas

(CBD)